

January 11, 2013

VIA ELECTRONIC MAIL

Frank Lindh, General Counsel
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California Public Utilities Commission
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**Re: Comments of Pacific Gas and Electric Company on Revised Resolution L-436
Regarding The Development of New Regulations Regarding Public Access To
Records Of The CPUC And Requests For Confidential Treatment Of Records**

Dear Messrs. Lindh and Harris:

Pacific Gas and Electric Company (PG&E) hereby submits these comments on revised Draft Resolution L-436 (Draft Resolution), which was circulated on December 14, 2012.

PG&E recognizes that the Legal Division has put considerable time and effort into the Draft Resolution. PG&E expressed cautious support for the prior versions of the Draft Resolution, and agreed with the Commission's intent to create greater transparency. However, PG&E now opposes the Draft Resolution as legally flawed, overbroad, and a poor use of limited Commission and party resources. PG&E is particularly concerned about the Draft Resolution's potential to compromise public safety through the release of critical utility infrastructure information, as well as its disregard for the privacy concerns of utility employees. For these reasons, PG&E requests that the Draft Resolution be rejected, withdrawn, or significantly modified as recommended in these comments.

Background

On March 20, 2012, the Legal Division issued the original 27-page Draft Resolution, which proposed to replace General Order (GO) 66-C with a new GO 66-D. PG&E and Edison jointly supported the Commission's efforts to re-evaluate GO 66-C and implement the California Public Records Act (CPRA). PG&E and Edison cautioned, however, that the Commission's interest in public disclosure under the CPRA needed to be balanced with the requirements of Public Utilities Code Section 583. PG&E and Edison proposed further procedures and workshops to ensure that the requirements of both the CPRA and Section 583 would be honored.

On July 13, 2012, the Legal Division issued a revised 47-page Draft Resolution. The revised Draft Resolution contained some improvements over the original, but it failed to remedy some of the legal defects identified by PG&E and Edison in their comments on (and “redline” of) the original Draft Resolution. Further, the revised Draft Resolution included troubling new language (1) purporting to justify the Commission’s authority to delegate its statutory responsibilities under Section 583 to staff and (2) suggesting that – despite the original Draft Resolution’s assurances that existing legal, statutory, and Commission-approved privileges and protections would be preserved – Decision 06-06-066 and possibly other protections could be open to reconsideration.

Five months later, on December 14, 2012, the Legal Division circulated another revision of the Draft Resolution, which has now ballooned to 137 pages. Nearly twenty pages (pp. 20-38) are devoted to summarizing and responding to comments on the original Draft Resolution, and over sixty pages (pp. 38-101) are devoted to summarizing and responding to comments on the revision. The original Draft Resolution had 16 Findings of Fact and 55 Conclusions of Law; the latest revision has 22 Findings of Fact and 124 Conclusions of Law.

The Legal Division provided parties with 14 days (from December 14 to 28) to prepare comments on the latest revision. At the request of several parties, the Commission extended the deadline for comments to January 11, 2013.

Draft Resolution L-436 Is Legally Flawed

PG&E opposes Draft Resolution L-436 because it is legally flawed. Due to time constraints, PG&E provides the following three illustrative examples of legal error, but reserves its right to challenge other aspects of the revised resolution should the Legal Division decline to withdraw the Draft Resolution in its entirety.

- **Draft Resolution L-436 Continues To Misconstrue Section 583**

In comments on the original Draft Resolution, PG&E and Edison argued that the Commission should be careful to ensure that its public records process complies with Public Utilities Code Section 583, which provides:

No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor. [Emphasis added.]

Other parties filed similar comments challenging the Commission’s authority to ignore

the express language of Section 583. In response, the revised Draft Resolution contains a legal treatise (at pp. 44-54) attempting to justify the Commission's authority to treat utility information as public unless proven otherwise, and to delegate to staff the authority to disclose information designated by the utility as confidential. Two examples of the revised Draft Resolution's many justifications include the following:

“PG&E/SCE suggest that the standing PRO resolutions they propose can overcome our inability to delegate to staff any authority to determine the merits of a confidentiality claim by serving as a Commission ratification of any proposed staff determinations.... We do not believe such ratification is essential since we have confidence in our ability to order that information furnished to the CPUC without a request for confidential treatment is presumed to be public, and to delegate to staff responsibility to determine whether information falls within a class designated as public, a class designated as confidential, a class requiring additional information prior to such a determination, or a class requiring specific action by the Commission.” (Draft Resolution, pp. 37-38, emphasis added.)

“Nor does §583 prevent us from adopting the presumption that information furnished by utilities is public, unless the utility requests and is granted confidential treatment.... We decline to read into the statute limits that do not exist.” (Draft Resolution, p. 45, emphasis added.)

The revised Draft Resolution flips Section 583 on its head, holding that all utility information provided to the Commission should be presumed public unless determined otherwise, and that such confidentiality determinations may be made by a staff member rather than “on order of the commission.” This is simply inconsistent with the plain language of the statute.

The importance of Section 583 cannot be overstated. Regulated utilities such as PG&E provide extraordinary amounts of information to the Commission, not just in specific regulatory proceedings but also in response to general requests by the Energy Division, Consumer Protection and Safety Division, and other staff members. If the Draft Resolution is adopted as currently written, it not only will violate the express language of Section 583, but more importantly will have a chilling effect on PG&E's willingness to provide such information to the Commission, and will in turn hamper the Commission's ability to fulfill its constitutional duties.

- **Draft Resolution L-436 Violates The Privacy Rights Of Utility Employees**

In a striking change from previous versions, the revised Draft Resolution proposes to reveal the “names of utility employees identified in [certain safety] records,” including the names of “individuals whose activities had a positive or negative effect on safety issues covered in the inspection or audit.” (Draft Resolution, p. 15, emphasis added). The only rationale for this invasion of privacy is the simple statement: “We do not believe that such individuals generally have objectively reasonable expectations of

privacy with regard to their identity and actions in the context of their performance of safety-related duties or their communications with the CPUC.” (Draft Resolution, p. 15.)

There is no legal or factual basis for the Legal Division’s assertion that utility employees involved in safety incidents have no “objectively reasonable expectations of privacy.” Utility employees have an exceedingly difficult job. Safety incidents with which they are involved are subject to investigation by the utility, its regulators, and potentially third parties such as litigants. Again, utilities such as PG&E provide extraordinary amounts of information to the Commission, including detailed information about safety incidents and the utility employees associated with them, in order to help the Commission fulfill its constitutional duties.

The revised Draft Resolution itself acknowledges that, in court cases involving public disclosure of employee information, “the court must determine whether the potential harm to privacy interests outweighs the public interest in disclosure.” (Draft Resolution, p. 74, *quoting BRV, Inc. v. Superior Court* (2006) 143 Cal. App. 4th 742, 755.) Indeed, in *BRV*, the Court found that “all names, home addresses, phone numbers, and job titles” should be redacted from public disclosure because “Nothing in the record indicates that these persons are public officials....Knowing their identities does not help the public understand [the situation at hand].” (Draft Resolution, p. 75, *quoting BRV*, 143 Cal. App. 4th at 759.)

PG&E’s employees are not public officials, and they have a reasonable expectation of privacy with regard to their identity and actions in the context of safety-related reports. PG&E objects to the Draft Resolution’s assertions to the contrary.

- **Draft Resolution L-436 Violates Utilities’ Due Process Rights**

The revised Draft Resolution notes that a “number of commenters ask that we provide them with notice and an opportunity to object to disclosure every time we receive a records request or subpoena seeking disclosure of records they provided to the CPUC.” (Draft Resolution, p. 93.) The Legal Division declines to provide such notice, arguing:

[W]hile we could provide some degree of notice by posting records requests and subpoenas on our internet site, is not practical for us....When we receive records request and subpoenas, we determine whether we have responsible records, and whether such records are available to the public or the subpoenaing party. If the records are subject to a statute prohibiting disclosure, a CPUC privilege or CPRA exemption the CPUC chooses to assert, or a CPUC decision, order, or ruling prohibiting or limiting disclosure, we do not provide the requested records; no input from regulated entities is required.” (*Id.*)

In other words, even though Section 583 requires the Commission not to disclose public utility records except “on order of the commission,” the Legal Division has determined that it can unilaterally disclose such information if it determines that “such records are

public,” without providing the utilities with notice of the request for disclosure or an opportunity to be heard.

While providing utilities with notice and opportunity to be heard may not be convenient or “practical” for the Commission, due process requires that such notice be provided, particularly given the Legal Division’s apparent belief that – notwithstanding the express language of Section 583 – all public utility information should be presumed to be public unless demonstrated otherwise.

Draft Resolution L-436 Is Overbroad And A Poor Use Of Limited Commission And Party Resources

Nearly ten months have passed since Draft Resolution L-436 was first circulated for comment. During that time, the document has morphed from a well-intentioned but flawed 27-page proposal for updating GO 66-C, to an overbroad 137-page legal treatise on the Commission’s authority to disclose public utility information, including directives for numerous Commission databases, portals, and matrices, as well as countless days of workshops. Implementing the proposed framework will be complex, costly and time-consuming. There are more effective, simple approaches that can be expeditiously implemented by the Commission to achieve its objectives.

As revised, Draft Resolution L-436 does too little and too much at the same time. Accordingly, PG&E requests that Draft Resolution L-436 be withdrawn or rejected.

Many of the Draft Resolution’s “to do” items may be accomplished without a resolution. Specifically, the Commission already has authority to create

- (1) “a comprehensive online index that describes the records maintained by the CPUC, and explains whether, and how, they may be located” (Draft Resolution, p. 2);
- (2) “an online safety portal that will augment and house the safety-related records and information [the CPUC] currently provide[s]...[and] will describe the CPUC’s safety jurisdiction and inspection, investigation, and enforcement activities” (Draft Resolution, p. 2); and
- (3) “a database for advice letter filings that would provide the public and others with a central location for tracking advice letter filings, protests, responses to protests, and other actions associated with the myriad of advice letters received by the CPUC and currently maintained by individual divisions” (Draft Resolution, pp. 31-32).

The Commission does not need to modify GO 66-C or issue a resolution to engage in these actions, and the public’s access to Commission records would be significantly improved.

If the Commission wishes to clean up GO 66-C to delete references to “provisions of law that have been amended or repealed and CPUC positions that have been renamed” (Draft Resolution, p. 5), the Legal Division could issue a new, narrowly crafted resolution to do so. Such a resolution would be focused enough to provide

parties with a reasonable opportunity to comment, and for a final resolution to be issued within the year.

If the Commission wishes to disclose CPUC records of completed safety-related record (Draft Resolution, p. 2, item (2)), as well as other safety-related reports (Draft Resolution, pp. 18-19) without issuing a resolution for each disclosure, the Legal Division could issue a new, narrowly crafted resolution proposing both a specific process and focused workshops. The Legal Division should ensure that this new resolution is served on all affected entities (*e.g.*, natural gas utilities, railroad operators, mobile home park operators, propane operators). The disappointing June 19, 2012 workshop demonstrated how critical it is for the Legal Division to have a clear agenda and focus, and for all affected entities to have adequate notice and opportunity to participate.

Finally, PG&E urges the Legal Division to abandon its efforts to create “matrices identifying classes of records as public or confidential” and “an online database to include requests received by the CPUC to treat documents as confidential and the CPUC's responses to such requests.” (Draft Resolution, p. 2.) To the extent there is a dispute about confidentiality in a formal CPUC proceeding, the current process of having the Assigned ALJ resolve such disputes appears to be working satisfactorily. However, as noted above, regulated utilities such as PG&E provide extraordinary amounts of information to the Commission during discovery or outside of formal CPUC proceedings. It would be unduly burdensome and unnecessary for the Commission to track and opine on the confidentiality of all such information.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brian K. Cherry', with a stylized, cursive script.

Brian K. Cherry
Vice President, Regulatory Relations
On Behalf of Pacific Gas and Electric Company

cc (via electronic mail): jva@cpuc.ca.gov
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